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No. 90-894

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In the Supreme Court of the United States

OCTOBER TERM, 1990

REYNOLD LEONE, AS ADMINISTRATOR OF THE ESTATE OF ANDREA LEONE, ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a physician in private practice who is designated by the Federal Aviation Administration (FAA) as an Aviation Medical Examiner permitted to certify that a pilot meets FAA medical fitness standards is "an employee of the government" under the Federal Torts Claims Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 910 F.2d 46. The opinion of the district court (Pet. App. B1-B16) is reported at 715 F. Supp. 1182.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1990, and a petition for rehearing was denied on September 6 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on December 5, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners administer the estates of two persons who died in a private plane crash. They filed suit on behalf of the decedents' estates under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, claiming that the United States was responsible for the alleged negligence of private physicians who, as Aviation Medical Examiners (AMEs), certified the pilot's medical fitness. The district court found that an AME is an "employee" of the United States within the meaning of the FTCA. See Pet. App. B1-B16. The court of appeals reversed that determination and directed the district court to enter summary judgment for the government. *Id.* at A1-A12.

1. The Federal Aviation Administration (FAA) requires licensed pilots to hold a current medical certificate. 14 C.F.R. 61.3(c). The FAA has designated AMEs to issue medical certificates based on a medical examination and an evaluation of the pilot's medical history. 14 C.F.R. Pt. 67. The AME is typically a private physician who maintains a private practice or is affiliated with a private hospital. The FAA's Federal Air Surgeon or his authorized representative selects AMEs from qualified applicants for one-year renewable periods, terminable at the FAA's discretion. 14 C.F.R. 183.11(a), 183.15(a) and (d). See Pet. App. A4-A5.

The AMEs must be: (1) licensed in the geographic area where they wish to serve; (2) professionally qualified and in good community standing; and (3) engaged in full-time practice at a specific address. FAA Order 8520.2C, para. 9(a)(1) (1978) (rev. 1981). AMEs set their own fees and most often conduct examinations in their own offices, which must be properly suited and equipped to perform the required examinations. FAA Order 8520.2C, para. 9(a)(3)(e)). The pilot/applicant picks the AME of his choice and pays the physician directly. The FAA neither provides insurance

for the AMEs, nor pays workers' compensation or social security taxes on their behalf. Pet. App. A5.

The Federal Air Surgeon provides "general supervision" of the AMEs (14 C.F.R. 183.21(b)), who are referred to in FAA regulations as "representatives" of the FAA (14 C.F.R. 183.1). AMEs are given a Guide for Aviation Medical Examiners, which contains instructions for reviewing medical certificate applications, including conduct of physical examinations and completion of the FAA medical examination form. The FAA continually evaluates AMEs, primarily assessing: (1) adequacy of information they provide on examination forms; (2) their "error rate" in certification; (3) comments about them from the aviation community; (4) their attendance at seminars; and (5) reports on their performance. Pet. App. A5-A6.

The pilot in this case was examined and certified by one AME in 1982 and by another AME in 1984; both AMEs were physicians engaged in private practice. Pet. App. A6. At the time of these examinations, the pilot had heart disease and other ailments that would have disqualified him under 14 C.F.R. 67.17(e), but, in violation of federal law (18 U.S.C. 1001), the pilot failed to disclose those medical conditions. Pet. App. A6.

2. Petitioners brought this FTCA action on the theory that the AMEs who examined the pilot were "employees" of the government and that the government was therefore responsible for their alleged negligence in failing to discover the pilot's ailments. The parties moved for summary judgment on the question whether the AMEs were employees within the meaning of the FTCA. The district court held that the government exercised "strict control" over the physicians and they were therefore employees within the meaning of the statute. Pet. App. B2, B5-B15. The court of appeals granted the government's petition for interlocutory

review (see 28 U.S.C. 1292(b)) and reversed the district court's determination. Pet. App. A4.

The court of appeals explained that the FTCA subjects the government to suit for damages caused by the negligence of "any employee of the Government" (28 U.S.C. 1346(b)) and that the term "employee" includes "employees of any federal agency * * * and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation" (28 U.S.C. 2671). Pet. App. A7. The court observed, however, that the FTCA's waiver of sovereign immunity does not extend to torts committed by "independent contractors." *Ibid.* The court of appeals, like the district court, concluded that the crucial question in distinguishing an "employee" from an "independent contractor" is whether the government exercises "strict control" over the person. Pet. App. A7-A9. See *United States* v. *Orleans*, 425 U.S. 807, 814 (1976); *Logue* v. *United States*, 412 U.S. 521, 527-528 (1973).

The court of appeals disagreed, however, with the district court's determination that the "strict control" standard was satisfied in this case. Pet. App. A9-A11. It observed that "detailed regulations and evaluations" by themselves are insufficient to meet the test. *Id.* at A9. The issue, the court stated, "is not whether a contractor must comply with federal regulations and apply federal standards, but whether its day-to-day operations are supervised by the Federal Government." *Id.* at A10. The court then explained that "while the FAA acts generally as an overseer, it does not manage the details of the AME's work or supervise him in his daily duties," there being no "on-site review or day-to-day management." *Ibid.**

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* The court found support for this analysis in the Restatement (Second) of Agency § 220(2) (1958), listing relevant factors to distinguish

The court of appeals observed that the FAA does not maintain control over the detailed physical performance of the AMEs, who "are professionally qualified physicians," "most [of whom] maintain their own private medical practices or are affiliated with hospitals" and "examine as few or as many applicants as [the AME] desires." Pet. App. A11. Beyond being professionals, the court noted, the AMEs "obviously are specialists" whose performance "clearly requires special skill and training" and "who usually work without supervision." *Ibid.* They are "responsible for being informed as to the progress of aviation medicine" and "necessarily rely on their professional judgment in making certification decisions." *Ibid.* The court also observed that the AMEs set their own fees and that the FAA provides them with no insurance, and pays no workers' compensation or social security taxes on their behalf. *Ibid.* It concluded that "[v]iewed in toto, these factors demonstrate that AMEs are independent contractors and not employees of the government." *Ibid.*

The court also rejected petitioners' argument that AMEs "act[] on behalf" of the FAA because they are deemed "representatives" of the FAA and are provided with FAA "identification." Pet. App. A11-12a. The court explained that "[a]uthorities that have discussed this clause indicate that it is designed to cover special situations such as government officials who serve without pay, or an employee of one government agency who is loaned to and works under the direct supervision of another government agency." *Id.* at A12. See *Logue*, 412 U.S. at 531. Any broader interpretation, the court reasoned, "would seriously undermine the FTCA's independent contractor exemption." Pet. App. A12.

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employees from independent contractors, including "the extent of control which, by the agreement, the master may exercise over the details of the work." *Ibid.*

ARGUMENT

This Court has set forth the standard for distinguishing government employees from independent contractors for purposes of the FTCA. See *United States* v. *Orleans*, *supra*; *Logue* v. *United States*, *supra*. As petitioners acknowledge, and both the district court and the court of appeals recognized, "the critical factor" is the "authority of the principal to control the detailed physical performance of the contractor." Pet. 12. The court of appeals correctly applied that test in this case, and its decision does not conflict with any decision of another court of appeals. The only issue here is whether the court of appeals properly applied a settled standard to a particular set of facts. That question does not warrant this Court's review.

1. Petitioners argue that the court of appeals' decision in this case warrants review because it "threatens the collapse of the AME system and public safety." Pet. 9-10. There is no showing in the record, however, that this is true. The courts below did not address whether, as petitioners assert, AMEs have a "justified expectation" that "they would be protected by the government from defending such suits and personal liability" (*id.* at 9). And there is no reason to believe that the court of appeals' decision will impair FAA oversight of AMEs or "lead to AME resignations." *Id.* at 10. Indeed, these are matters of legislative concern. Accordingly, petitioners' policy arguments provide no basis for this Court's review.

2. Petitioners also argue that the court of appeals' decision warrants review because it "has abrogated the statute by judicially creating an exemption." Pet. 11-12. They contend that the FTCA's definition of an employee, which includes "persons acting on behalf of a federal agency in an official capacity" (28 U.S.C. 2671), "literally appl[ies]" in this case. Pet. 11. As the court of appeals explained,

however, the "[a]uthorities that have discussed this clause indicate that it is designed to cover special situations such as government officials who serve without pay, or an employee of one government agency who is loaned to and works under the direct supervision of another government agency." Pet. App. A12 (citing *Logue*, 412 U.S. at 531; 1 L. Jayson, *Handling Federal Tort Claims* § 203.04, at 8-75 (1990)). Petitioners, by contrast, cite no court decision or other authority that has accepted their interpretation of the statutory language. Petitioners' disagreement as to the meaning of the statute accordingly raises no issue warranting this Court's review.

3. Petitioners next argue that the court of appeals "deviated from this Court's decisions." Pet. 12-17. That statement also is inaccurate. The court of appeals simply applied the "strict control" test that this Court developed in *Orleans* and *Logue* to the particular facts of this case. Pet. App. A7-A11. Petitioners concede that the "strict control" test is the appropriate standard. Pet. 12. They quarrel only with the court of appeals' application of the standard to this particular case. *Id.* at 15. Specifically, petitioners contend that the "record * * * established pervasive, constant and 'daily' control exercised by the FAA over the physical performance of AMEs through the Federal Aviation Regulations, FAA Guide, and Order." *Ibid.* The court of appeals concluded, however, that "while the FAA acts generally as an overseer, it does not manage the details of an AME's work or supervise him in his daily duties." Pet. App. A10. Petitioners' factual disagreement with the court of appeals does not present a question warranting this Court's review.

4. Finally, petitioners assert that the court of appeals' decision "conflicts with prior circuit and district court decisions." Pet. 17-18. The only court of appeals decision they cite is *Witt* v. *United States*, 462 F.2d 1261 (2d Cir. 1972),

a case that involved the status of a person hired to assist in the management of stables located on a military reservation. Even if that case, which does not involve AMEs, raised a conflict, it is solely an intra-circuit conflict that does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Indeed, in the only closely analogous court of appeals decision, involving the status of FAA-authorized airplane inspectors, the Eighth Circuit ruled, as in the instant case, that the inspectors were not government employees. *Charlima, Inc.* v. *United States*, 873 F.2d 1078 (1989). Thus, the issue presented in this case has not divided the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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